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In the Supreme Court of the United States

October Term, 1982

CLARK OIL & REFINING CORPORATION,
Petitioner,

vs.

HAROLD ALDERSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

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December 10, 1982

QUESTIONS PRESENTED FOR REVIEW

When a verdict for nominal damage and substantial punitive damages returned against petitioner corporate employer and in favor of respondent employee, was based upon petitioner's alleged failure to write a letter required by a penal statute which must truly state for what cause the employee had left the employment and where the employer was subject to absolute civil liability for any alleged untrue or erroneous statements in the letter:

I. Can such liability be imposed against petitioner and other corporate employers under the statute which created liability by the use of general terms (i.e., "truly stating for what cause"), but failed to contain any specific standards or criteria by which to determine that liability, without violating the requirement of the Due Process Clause of the Fourteenth Amendment prohibiting the imposition of liability where the law fixing the same fails to give the employer fair warning or notice of what constitutes a true cause for a dismissal from employment or other required statements, and where the employer was exercising First Amendment rights in expressing its views about the employee?

II. Can punitive damages be recovered from the petitioner and other corporate employers under a generalized liability-creating statute which commanded that a letter issue, without requiring the jury to find actual malice, particularly where only an award of nominal damage was assessed, where the defenses of good faith or negligence in writing the letter were denied to petitioner, and where the cause arose out of the exercise of First Amendment rights of free expression by petitioner in setting forth its views as to the termination of the employee's service,

or does such a recovery under these circumstances violate the protections of the Due Process Clause of the Fourteenth Amendment and those of the First Amendment?

III. Does an award of damages against petitioner and other corporate employers under the absolute liability imposed by this statute violate the Equal Protection Clause of the Fourteenth Amendment by singling out only corporate employers for liability where there is no showing that the statute requiring or compelling this communication can be presently justified either under the traditional "rationality" test or the more strict "substantial governmental interest" test where fundamental rights such as freedom of expression are involved?

PARTIES TO THE PROCEEDINGS

This suit was filed originally by Harold Alderson against Clark Oil & Refining Corporation and Charles Palmquist in the Jackson County (Missouri) Circuit Court; at the time the case was submitted to the jury, Alderson had dropped his claims against Palmquist, and proceeded only against Clark. Palmquist was not a party to the appeals.

Petitioner is a privately held corporation, and has no public stock ownership.

III

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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WESTERN DISTRICT**

OPINIONS BELOW

The Circuit Court of Jackson County issued a short unreported written opinion, which is set forth in Appendix A to this petition. The opinion of the Missouri Court of Appeals, Western District is officially reported at 637 S.W.2d 84, and is set forth in Appendix C to this petition. The order of the Missouri Supreme Court denying transfer of the appeal from the Court of Appeals is unreported, and is set forth in Appendix B to this petition.

JURISDICTION

The judgment and opinion of the Missouri Court of Appeals, Western District, was filed on May 4, 1982. A timely petition for rehearing was filed with the Court of Appeals on May 19, 1982, along with an alternative

motion for transfer to the Missouri Supreme Court, which the Court of Appeals denied on June 23, 1982. A timely application to transfer the appeal was filed with the Missouri Supreme Court, which that Court denied on September 13, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves: Par. I, Amendment XIV and Amendment I of the Constitution of the United States; and Section 290.140, Revised Statutes of Missouri (1978). The pertinent provisions thereof are set forth in full in Appendix D to this petition.

STATEMENT OF THE CASE

Proceedings Below

Petitioner is a corporation engaged in retail gasoline sales through service stations operated within the State of Missouri by its employees. At the time of the events giving rise to this litigation, Missouri had a penal statute (§290.140, Revised Statutes of Missouri), applying to such corporate employers only, requiring it to furnish a letter upon request of a "laboring man quitting service of [a] corporation", signed by the entity's superintendent or manager, and setting forth: the nature and character of service rendered by the employee, the duration thereof, and the true cause why the employee quit such service. This law (colloquially known as the "Service Letter Statute"), further provided that if any superintendent or manager failed or refused to issue the letter when re-

quested, they "shall be deemed guilty of a misdemeanor," and fixed the punishment by fine or by imprisonment in jail, or both. (The statute's text is at App. D). The statute, enacted in 1905, made no provision for a private cause of action for damages against the corporation, but in 1916 the Missouri Supreme Court held that such a cause could be maintained by a former employee, whose officials had failed to provide a letter, which truly stated the reason, if any, for the employee's departure from the corporation's service. *Cheek v. Prudential Insurance Co.*, (Mo. 1916) 192 S.W. 387, 391.

This cause originated in December 1976, when Respondent employee, Harold Alderson, left his employment as a station manager for Clark. He thereafter, through his attorney, requested a service letter from Petitioner, which was sent him, and read as follows:

"December 22, 1976
Mr. Harold Alderson
554 Oxford
Independence, Missouri 64053

Dear Mr. Alderson:

This is in response to your letter of December 15, 1976. Be advised that you were employed by Clark Oil & Refining Corporation as a manager of one of our stations. In such capacity, your responsibilities included the general management of our station located at 202 West 23rd Street, Independence, Missouri. I have enclosed a copy of a job description for a further amplification of your duties as manager. You were employed from July 2, 1975, until December 17, 1976, and the reason you were terminated was that your performance simply was not satisfactory to Clark. That is, the station and its facilities were not main-

tained to Clark's standards, you did not furnish your Master Reports in a timely fashion to Clark, and on December 7, 1976, an audit uncovered a loss of almost \$400.00 at the station you were managing.

Very truly yours,

Clark Oil & Refining Corporation

David W. DeNeff

District Manager"

Thereafter, Alderson filed suit for damages against Clark and one Charles Palmquist (who worked for Clark in a supervisory capacity at the time of Alderson's departure from Clark) in the Missouri Circuit Court. The cause was tried to a jury in October 1980 for a second time (an earlier verdict had been set aside and a new trial ordered), resulting in a verdict against Clark for one dollar nominal damage and one hundred thousand dollars punitive damages. Alderson did not submit against Palmquist.

Upon Clark's motion for judgment N.O.V. or new trial, the trial court set aside the punitive damages award but left intact the nominal damage verdict. The trial court determined that the evidence failed to support the punitive damages submission, but overruled petitioner's constitutional challenges to the statute and the nominal damage verdict. The court also granted the alternative new trial motion as to punitive damages. (See App. A). Thereafter both petitioner and respondent appealed the trial court's judgment to the Missouri Court of Appeals, Western District.

The Court of Appeals, on May 4, 1982, reversed that part of the trial court's judgment which set aside the punitive damages award, and likewise reversed the new

trial award and reinstated the verdict against petitioner. The Court of Appeals also sustained the trial court's judgment denying petitioner relief against the nominal damage verdict. See 637 S.W.2d 84. (A copy of the Court of Appeals' decision is set out at App. C). Clark's motion for rehearing or, alternatively, for transfer to the Missouri Supreme Court was overruled by the Court of Appeals on June 23, 1982, and an application to the Supreme Court was unavailing, being denied on September 13, 1982.

Details of the Case

Alderson had been employed by Clark since July 1975, and was promoted to service station manager in May 1976. He continued to manage a Clark station until he left Clark's employment in December 1976. His immediate supervisor was the retail sales representative, Charles Palmquist, who in turn was supervised by the district manager, David DeNeff.

On December 7, 1976 Alderson was on his way home after work and stopped at another Clark station to see a Bob Thompson, its manager. There Alderson met Charles Palmquist, his supervisor, who suggested that the three of them go out for a drink. Thompson declined, but Alderson and Palmquist left for a nearby lounge, where they remained for several hours. During the evening, Palmquist asked Alderson for his opinion of Thompson's potential for advancement, and Alderson indicated his lack of confidence in Thompson's ability because of alleged shortages at his station. This statement apparently upset Palmquist who suggested that Alderson was probably the one whose station was short. Alderson offered him the keys to the station and invited Palmquist to conduct an immediate audit. Palmquist declined.

After the two had parted company, Alderson returned to his station. Palmquist preceded him, and appeared to be intoxicated. Alderson summoned the police who asked Palmquist to leave, which Palmquist did, but before leaving the station he attempted to call the district manager, DeNeff, to inform him of what was going on. (Transcript, hereafter "T.", 62) Alderson said that he himself did not attempt to talk to DeNeff nor try to reach him that evening. (T. 62) He testified that he had been fired by Palmquist that night (T. 67), although DeNeff said it was on December 8 (T. 184). Rather than lock the station and leave after Palmquist left, he destroyed the company safe, holding money collected at the station, by drilling the cast iron steel for approximately 1½ hours until he got the money out. He testified that he destroyed the safe, even though no one else including Palmquist could have opened it that evening, by use of a drill from his car. (T. 64) In response to a question of whether or not the drilling of the safe took place after Palmquist had fired him, Alderson indicated that it had. (T. 58)

In direct examination Alderson maintained that he had Clark's authority to take the money from the station, without any mention of Palmquist firing him. (T. 33) He testified that the following morning Palmquist was interested in forgetting the whole incident but apparently Alderson was not interested in continuing with his employment. (T. 34-35)

DeNeff testified that Palmquist had contacted him the evening of December 7, and informed him to some extent of what was occurring. (T. 126-127) Next morning DeNeff went to the station where Palmquist only was present conducting an audit. (T. 128) DeNeff noticed that the safe had been drilled out, and the money missing. (T. 128) DeNeff called Alderson and asked him what

had happened, and asked where the money and the reports were. (T. 129) Alderson at that time informed DeNeff that the reports and money were at his lawyer's office. (T. 129) DeNeff told Alderson that unless he turned over the money and reports, that he would have to go to the prosecutor (T. 129) DeNeff and Alderson agreed to meet and Alderson agreed to turn over the money and reports. (T. 129)

At the meeting on December 8, according to Alderson, DeNeff indicated that he would reprimand Palmquist, or lay him off, and would consequently think of some reason for terminating Palmquist. (T. 26) Alderson said that at that time the possibility of his staying with Clark was not discussed. (T. 36)

On December 9 DeNeff met Alderson at a bank, where Alderson returned the money. Alderson made no mention of any discussion at the bank regarding his future employment with Clark. (T. 40)

Alderson's first, and only mention in direct examination, of an alleged statement by DeNeff to make up a reason to fire Alderson rather than Palmquist, came in a description of what Alderson did after he left the bank. Alderson testified that he contacted his attorney, and he responded as follows to a question by his lawyer:

"Q. Alright and what was your concern at that time Mr. Alderson?

A. Mr. DeNeff had told me he would have to fabricate some reasons for termination because they were doing it, and I didn't understand why he would have to fabricate a reason for terminating, so I contacted you to find out what I should do."
(T. 40)

There is no testimony which fixes a date upon which DeNeff allegedly made this statement, nor in what context the alleged statement was made, or precisely what was said. Alderson contradicted his own testimony on this issue when he later testified that it was on December 8, not on the 9th, that he first contacted his attorneys (T. 68, 82), while DeNeff testified that Alderson told him on the 8th that he already contacted his lawyers. (T. 130)

The only other mention of the alleged statement about making up a reason to fire Alderson came in cross-examination where Alderson indicated that the only explanation that he could give why DeNeff would have told him that he would have to make up a reason to terminate him. (T. 69-70) DeNeff testified that nothing in his personal dealings with Alderson would have affected his judgment in sending Alderson the letter (T. 138), which was not contradicted by Alderson.

On December 15, Alderson requested the service letter. The letter recited that Alderson had been employed by Clark from July 2, 1975 until December 17, 1976, when he was terminated due to poor maintenance of the station, untimely filing of master reports and a shortage of \$400.00 uncovered in an audit on December 7, 1976. DeNeff said the audit revealed a shortage of \$696.55, including \$78.00 in employee loans (T. 162), and employee shortages of \$200.00 to \$300.00 (T. 133-134), both of which were uncollectable. (T. 168) He testified that a further difference between the two audit figures was a damaged merchandise figure of \$84.87. (T. 171) As far as DeNeff was concerned on December 8th, Alderson was \$2300.00 short, because that was the amount needed to be accounted for by the audit conducted on that day. (T. 173-182)

DeNeff signed the service letter, which was sent out about December 22 upon the request of Alderson and his lawyers, and was based upon information given by DeNeff. The letter gave Alderson's dates of employment as July 2, 1975 to December 17, 1976, the latter date admittedly a typographical error. As reasons for leaving the employment, the letter recited that Alderson had failed to satisfactorily maintain the station and its facilities; had failed to furnish master reports in a timely fashion; and that on December 7, 1976, an audit uncovered a loss of almost \$400.00 at the station. Evidence given by DeNeff at the trial was that he based the letter upon his views that Alderson had failed to keep the station up to the standards that Clark required (e.g. see T. 123-124, 184-185); that Alderson had failed to send in his daily master reports on time (e.g. see T. 121-122, 125-126, 184-185); and that the audit run on December 8 demonstrated a shortage at the station of about \$400.00 (e.g. see T. 131-135, 184-185), shortages about which DeNeff was aware when he wrote the service letter in issue (T. 146, 184-187). DeNeff also testified that December 7 was the last day that Alderson had worked, but that he was fired the next day (T. 185), 8 December.

No one, other than Alderson ever requested or inquired of Clark to see the letter. (T. 142) Alderson offered no examples of any employers receiving any information from Clark, directly or indirectly, regarding the letter or its contents, nor did any prospective employer ever indicate that Clark had given Alderson a negative reference.

Alderson presented only one example of a prospective employer to whom he had allegedly shown the letter, a credit union in May or June 1980. (T. 50-51, 79) However, the union's collection manager, to whom Alderson

applied, testified that he did not know what a service letter was (T. 191); that he did not recall the contents of any such letter (T. 194); and that Alderson lacked the experience and qualifications for the job without regard to any letter. (T. 193) Furthermore, the manager testified that Alderson did not really seem interested in the credit union job, because of his other interests pertaining to this lawsuit which was then pending against his former employer, Clark. (T. 194)

In setting aside the punitive damages award, the trial court found that:

"There was no evidence upon which the jury could have found defendant had an ulterior motive, that the purported reasons defendant stated in its service letter were other than mistakes of fact or that defendant's conduct in writing its service letter in the manner in which it did was either willful, wanton, or malicious, that is, intentionally wrongfully written without just cause or excuse and that, therefore, the Court erred in submitting such issue and the jury's verdict, therefor and judgment thereon is and was erroneous and, as stated, not supported by competent and substantial evidence." (App. A).

Presentation of Federal Questions

Petitioner Clark challenged the constitutionality of the statute (§290.140, R.S.Mo.) and its application in an amended answer filed in March, 1980 (Record, Legal File, 49-51), and in August 1980 by way of a summary judgment motion filed in the trial court (Record, Supplemental Legal File, 30-33), which trial court overruled on September 2, 1980, without setting forth any reasons. Petitioner renewed the challenges at trial (T. 8-9, 117),

and again urged the constitutional claims in its motion for judgment N.O.V. (R., L.F., 72-86; also R., Supp. L.F. 1 et seq.), all of which the trial court overruled without stating reasons. (R., L.F., 87-89) Petitioner had challenged the statute on a number of federal grounds under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the freedom of speech proviso of the First Amendment, and included such claims as unconstitutional imposition of punitive damages without the necessity of finding actual damages, denial to petitioner of such defenses as good faith and so on, failure of the statute and its constructions to give petitioner corporate employer fair notice of what constituted a proper response to a service letter request, particularly as to what constituted a "true" reason for discharge; the law's application only to corporate employers, without the showing required by the Equal Protection Clause as to why it so discriminated, particularly when viewed in the light of its restrictions upon the petitioner's rights of corporate free speech; and other reasons. (R., Supp. L.F., 30 et seq.)

Petitioner appealed the trial court judgment denying the constitutional objections. (R., L.F.) The Court of Appeals rejected Petitioner's constitutional claims for the reason that "[a]ll the constitutional arguments advanced in Clark's brief have been considered by our Supreme Court (since Clark's brief was filed) and rejected. *Hanch v. KFC National Management Corp.*, 615 S.W.2d 28 (Mo. banc 1981); *Accord: Rimmer v. Colt Industries Operating Corp.*, 656 F.2d 323 (8th Cir. 1981)." (See C.A. Opinion, App. C, 637 S.W.2d at 85). While the Court of Appeals offered the observation that Clark in oral argument acknowledged the statute's constitutionality was "not now a viable issue" (App. A, 637 S.W.2d at 85-86), that characterization was inaccurate in that Clark's counsel pre-

served the constitutional challenges as demonstrated in the transcript of oral argument. (See App. E). Petitioner renewed the constitutional issues on May 19, 1982 in its motion for rehearing or alternatively for transfer to the Missouri Supreme Court, which the Court of Appeals denied without comment on June 23, 1982. Clark then filed its motion in the Missouri Supreme Court, asking that tribunal to transfer the case to examine the constitutional issues, along with other matters decided in the Court of Appeals' opinion, but which that Court denied without reasons on September 13, 1982. (See App. B).

REASONS FOR GRANTING THE WRIT

I.

This Court has repeatedly recognized that under the Due Process Clause no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes; and that the terms of a penal statute creating an offense unknown to the law must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, a requirement consonant with the ordinary notions of fair play and the settled rules of law. See *Giaccio v. Pennsylvania*, (1966) 382 U.S. 399, 400-405; *Thornhill v. Alabama*, (1940) 310 U.S. 88, 100; *Lanzetta v. New Jersey*, (1939) 306 U.S. 451, 453; and *Hynes v. Mayor of Oradell*, (1976) 425 U.S. 610, 620; to cite just a few examples.

The penal statute in this case, which forms the only basis for the cause of action against corporate employers, commands that such an employer truly state for what cause an employee has quit the employer's service and certain other information, but beyond this general

liability-creating charge it is completely devoid of specific guidelines or criteria by which to advise the employer of what constitutes a response sufficient to protect itself from liability when responding to the request for such a letter. Then by way of compounding the difficulty, the courts have in effect stripped the employer of any defenses such as good faith in writing the response or negligence in doing so, *Roberts v. Emerson Elec. Mfg. Co.*, (Mo. 1960) 338 S.W.2d 62, 72; *Potter v. Milbank Mfg. Co.*, (Mo. 1972) 489 S.W.2d 197, 206. And because the statute requires the corporation to affirmatively respond by a proper letter such is an intrusion or restriction upon the right of corporate speech, thereby raising a question of First Amendment rights.

There is no civil cause of action for damages at common law for a service letter such as this. Although the cause of action is solely based upon a state statute, § 290.140, R.S.Mo. (1978), it does not provide for any such action, rather the cause was implied by the courts from the statute, *Cheek v. Prudential Ins. Co.*, (Mo. 1916) 192 S.W. 387. When *Cheek* reached this Court in 1922 (see 259 U.S. 530), the issues raised were not the ones presented here, for example the Court never discussed nor decided the question of constitutional vagueness of the statutory language, nor the imposition of substantial punitive damages with requiring a finding of actual malice, nor was the equal protection ruling based upon the considerations that have been asserted here, rather it was upon 1922 considerations which reflected a much different economic, social and constitutional fabric than exists some 60 years later, as illustrated by the developments in the field of corporate free speech, and the extension of many, if not most, of the basic constitutional guarantees to the corporate form of business entity. *Cheek* was decided in a far different

era, when corporations were still a main point of regulatory focus, and when many forms of economic and social legislation were confined solely to them, having not yet been extended to cover other forms of business entities, as is now the case (see the discussion under Point III here). In fact much of the equal protection/due process determinations in *Cheek* were concerned with allegations of a conspiracy between insurance carriers (see 259 U.S. at 546-548) to deprive plaintiff of his right to sell insurance, as opposed to the issues raised here.

Over the years the courts have interpreted the statute in a confusing, contradictory and uncertain manner, a fact which has not escaped unnoticed by some courts, e.g. *Rimmer v. Colt Industries*, (C.A. Mo. 1981) 656 F.2d 323. The Court of Appeals noted that they would read certain state court decisions construing the law "more narrowly" than certain later state court rulings, *Id.* at 326, while another judge specifically noted (*Id.* at 331) the unevenness and lack of clarity in the holdings.

Against this background, petitioner contends that the application of this statute raises serious constitutional questions, both from a facial standpoint and that of application, particularly where it penalizes by imposing absolute liability under general and vague language without containing ascertainable standards, guidelines or conditions whatsoever as to what is meant by "truly stating" the cause for an employee's termination or with regard to the other items in the statute, so as to allow an employer to respond in a manner so as to protect itself and to allow a judge or jury to intelligently consider the liability issue. In this regard the vague language of the statute raises a question of deficiency such as was held violative of due process in such cases as *Giaccio*, where the employment of general abstract charges as "misconduct" and "represensible

conduct" was condemned, or in *Thornhill*, where the phrase "without just cause or legal exercise" failed to pass constitutional muster.

What is meant by "truly stating the cause"? Does it mean "just", or "correct", or "substantially true", or "honest" or "sincere"? What happens if there are multiple grounds as set forth which is the case here? If one ground is erroneous, and the others correct, does one erroneous ground by itself establish liability? Is an employer liable if there was an "honest" or "sincere" or good faith belief that the reasons or any part thereof are true, even though subsequent events may prove them incorrect? Is the employer liable where reasons given in a letter are believed correct, but the jury believes that other or additional reasons should have been included? Is an employer liable for honest though negligent mistakes? The fact is, the statute is so vague and standardless it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case, see *Giaccio v. Pennsylvania*, *supra* at 402-403.

The Missouri courts have consistently failed to specifically address this constitutional objection or have deliberately avoided doing so, not only in this case, but in other recent cases where they have evaded ruling or failed to specifically rule on federal constitutional objections. A good example is *Hanch v. K.F.C. Nat. Management Corp.*, (Mo. en banc 1981) 615 S.W.2d 28, 34, where by a one vote majority, the Missouri Supreme Court upheld the statute's constitutionality, yet, failed to *specifically* address the due process claim that the law provided no guidance as to what type of response constituted a proper service letter, choosing instead to avoid by means of conclusory assertions that carefully avoided federally-predicated objections.

Where a statute fails to provide required guidelines or standards, it allows the triers of fact to treat these cases as wrongful discharge actions, instead of actions under the Service Letter Statute, a situation analogous to that of *Vaca v. Sipes*, (1967) 386 U.S. 171, 188-195, where this Court ruled that a verdict was erroneously sustained where the case had actually been tried on the theory that an employee had been wrongfully terminated, when in fact the real issue should have been whether a labor organization had fairly and in good faith processed the employee's grievance as to the termination.

Lack of Defenses. As stated earlier, the difficulty in constitutionally applying the statute is compounded by decisional law, which refuses to allow the corporate employer to instruct the jury on its good faith in writing the letter or where it may have negligently drawn a response, as defenses, see *Potter v. Milbank Mfg. Co.*, *supra*, and *Roberts v. Emerson Elec. Mfg. Co.*, *supra*, or where it may have mingled some true statements as to termination with incorrect statements, or where the reasons that it gave in the letter may all have been correct, but the employer forgot or overlooked including another one. Yet nowhere in the statutory language are such defensive matters prohibited. Like the creation of the cause of action itself, such defenses are excluded only by judicial creation, and not by any express exclusion in the language of the statute. To make matters worse, the decisions hold on the one hand that the penal law is to be strictly interpreted in favor of the employer and against the employee's claim, see *Horstman v. General Elec. Co.*, (Mo.App. 1969) 438 S.W.2d 18, but then likewise refuse to recognize defenses such as good faith, etc., although this Court in *New York Times v. Sullivan*, (1964) 376 U.S. 254, 279-283, has recognized a qualified privilege of honest mistake of fact under the First and Fourteenth Amendments as a legitimate defense.

Impingement on the Exercise of First Amendment Rights. First of all, corporations are persons within the meaning of the Due Process Clause, which prohibits a state from depriving them of property without due process of law. *Grosjean v. American Press*, (1935), 297 U.S. 233, 244. Secondly, when a statute also impinges upon First Amendment guaranties of the exercise of free speech, the constitutional vices of the law working a deprivation of property are enhanced. This Court in *First National Bank of Boston v. Bellotti*, (1978) 435 U.S. 765, has clearly recognized the application of the free speech guaranties to corporations, and under the *New York Times*, *supra*; *Gertz v. Robert Welch, Inc.*, (1974) 418 U.S. 323, 350; and *Givhan v. Western Line Consol. School District*, (1979) 439 U.S. 410, 413, line of decisions has increasingly recognized rights of free expression, in areas of public and private communications, and has restricted statutory interference in these areas. Here the application of a statute directed only against corporate employers which is vague and uncertain in its liability-creating terms, which in the total absence of statutory authority to do so denies the employer defenses by way of judicial decision, which permits unlimited punitive damages based upon a nominal damage award but without a finding of actual malice, and which interferes with the exercise of corporate rights of free speech raises what petitioner believes are serious constitutional questions that this Court should resolve.

II.

There is a conflict between the federal and state courts in Missouri over whether punitive damages can be assessed without first finding actual malice. Federal district courts, at least in the Western District of Missouri, instruct their juries in service letter cases that actual malice must be

found first before punitive damages can be imposed, e.g. *Walker v. Modern Realty of Missouri, Inc.* (Docket No. 80-0077-CV-W-1). The U. S. Eighth Circuit Court of Appeals considered constitutional challenges to the statute in *Rimmer v. Colt Industries*, (C.A. Mo. 1981) 656 F.2d 323, reversing 495 F.Supp. 1217 (W.D. Mo. 1980), and expressed the view that:

"We do not decide the issue whether the service letter statute would be constitutional if it imposed liability without fault or permitted the recovery of punitive damages without a showing of actual malice. We can decide that question when it is properly before us. Moreover, we do not necessarily agree with the district court's view that the Missouri Supreme Court has decided these issues in the way the district court determined it has. We read *Potter v. Milbank Mfg. Co.*, 489 S.W.2d 197 (Mo. 1972) and *Roberts v. Emerson Electric Mfg. Co.*, 338 S.W.2d 62 (Mo. 1960) more narrowly than the district court, particularly in light of the recent Missouri Court of Appeals' decision in *Newman v. Greater Kansas City Baptist Hosp. Ass'n*, 604 S.W.2d 619 (Mo.App. 1980). [Other Missouri citations omitted]." (Emphasis supplied).

Rimmer raises the implication that the statute could not be constitutionally applied to allow punitive damages without finding actual malice, but does so by reading state court decisions more narrowly than do the state courts themselves, e.g. see *Hanch v. K.F.C. Nat. Management Corp.*, (Mo. en banc 1981) 615 S.W.2d 28. A concurring opinion in *Rimmer* stated:

"The majority opinion assumes that *Rimmer* can recover punitive damages only by proving that 'the reasons stated in the letter for the discharge were

false, that Colt knew they were false, and nonetheless wantonly and maliciously issued the letter.' Based on this assumption, I believe that the majority's standard for imposing punitive damages represents the minimum requirements for upholding the statute against attack on first amendment grounds." (656 F.2d at 331).

The federal courts of the Western District of Missouri have so interpreted *Rimmer*, and their instructions require a finding of actual malice. Yet for reasons yet to be articulated, legal malice continues to be used by state courts without explanation or reason for doing so.

Nevertheless in spite of the federal court decisions, which appear to be reading the state decisions in a more restrictive fashion because of the constitutional implications, the decisions of the state appellate courts have not hesitated to expansively read the penal statute to allow the imposition of substantial punitive damages without requiring juries to find actual malice. *Hanch v. K.F.C. Nat. Management Corp.*, *supra*; *Herberholt v. DePaul Community Health Center*, (Mo. en banc 1981) 625 S.W.2d 617, 624. Under the pattern instructions (Missouri Approved Instructions or M.A.I.) which the state supreme court requires be used to instruct a jury in these cases, the jury is instructed that punitive damages may be awarded if you believe that the defendant's conduct was malicious (M.A.I. No. 10.01, see App. F), which term is defined for the jury as legal rather than actual malice as follows:

"malicious as used in these instructions does not mean hatred, spite or ill will, as commonly understood, but means the doing of a wrongful act intentionally without just cause or excuse." (M.A.I. No. 16.01, see App. F).

There are no defensive M.A.I.s available to the corporate employers because, as already noted under Point I here, the courts have determined, without advancing any justification therefor, that the employers are not entitled to raise defenses such as good faith or negligence. E.g. *Potter v. Milbank Mfg. Co.*, (Mo. 1972) 489 S.W.2d 197, 206; *Roberts v. Emerson Elec. Mfg. Co.*, (Mo. 1960) 338 S.W.2d 62, 72.

It is readily apparent from a reading of decisions such as *Rimmer*, that the federal courts are concerned with the imposition of punitive damages on the basis of a finding of legal malice only, notwithstanding a contrary view held by the state courts. The clear concern of the federal courts is with an impairment of the corporate employer's First Amendment rights of free expression as outlined, for example, in the *Rimmer* case (especially see 495 F.Supp. at 1222-1223; and 656 F.2d at 326-327, 331 (concurring opinion)), wherein a concurring judge held that the district court analysis of the First Amendment rights was correct, and therefore under the standard laid down by this Court in *Gertz v. Robert Welch, Inc.*, (1974) 418 U.S. 323, 349, as applied to the service letter cases, a plaintiff, to recover punitive damages, must prove by a preponderance of the evidence that an employer made a false statement, knowing it to be false or with reckless disregard for its truth. 656 F.2d at 331. However, as stated under Point I of this petition, this is not the rule as set forth by state court decisions such as *Hanch* which in effect reject the concept of corporate free speech by simply replying that a corporate employer is only being required to speak truthfully, 615 S.W.2d at 35, but glossing over the infirmities in the statute which prevent such compliance.

Without unduly rehearsing the past, this Court has developed its line of authority on the media cases, such as *Gertz, New York Times v. Sullivan*, (1964) 376 U.S. 254, 279-80; *Curtis Publishing Co. v. Butts*, (1967) 388 U.S. 130, to confer free speech protection to various classes of private expression, e.g. *Givhan v. Western Line Consol. School Dist.*, (1979) 439 U.S. 410, 413, and in *First Nat. Bank of Boston v. Bellotti*, (1978) 435 U.S. 765 to corporate persons.

The difficulty with punitive awards under the statute such as the one challenged here runs deep because the statute's language fails to provide the corporate employer with fair notice of what constitutes a proper response to a request for a service letter, and then exacerbates the employer's position by denying it defenses such as good faith or negligence in responding, which has the effect of making the employer strictly liable for these damages regardless of how insignificant an error in the response may have been and despite the fact that the statutory language nowhere outlaws such defenses.

In light of the rules developed by this court for assessing punitive damages in the media cases such as *Gertz*, and where the mode of creating liability is viewed within the constitutionally vague context of the Due Process Clause, there is a serious unresolved issue of how far legislatures and courts may go in imposing such punitive damage liability under the guise of regulation.

III.

The statute applies to corporate employers only without any discernible justification which satisfies either of the tests developed to examine legislation under the Equal Protection clause. The statute was enacted as an adjunct to the state anti-blacklisting law, §559.390, R.S.Mo. (1969); *Cumby v. Farmland Industries*, (Mo.App. 1975)

524 S.W.2d 132, 135, but that statute was repealed in 1977 when the new Missouri criminal code was enacted by the legislature, and is therefore no longer a viable argument to support the Service Letter Statute. If the statute was designed to protect the reputations of employees it is underinclusive because it covers only those who work for corporations, and ignores the many persons employed by employer entities not covered by the law. As presently applied, it protects not only the reputations of employees who may actually have sustained actual injury to reputation, which is not the case here because the proof clearly established that Alderson did not use the letter, but also employees whose reputations have not sustained any actual injury, as is the case here, so that the §290.140 is over-inclusive as well.

There has been no rational distinction developed in the case law (state or federal) construing the statute that demonstrates a present justification for the law, either under the "substantial interest" test applied when fundamental rights such as free speech are involved, e.g. *Police Dept. v. Moxley*, (1972) 408 U.S. 92, 95, or under the more traditional "rationality" test, prohibiting arbitrary statutory classification, which classification to be valid must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. *Stanton v. Stanton*, (1975) 421 U.S. 7, 14. Yet here there is no rational basis to distinguish between corporations on the one hand and other types of employers entities such as partnerships or individuals on the other. In today's world is an employer more suspect because it takes a corporate form than another type, or does the common experience give rise to judicial notice or established fact that corporations are more of a problem than other forms of business entities?

If corporations are generally such a special regulatory problem, in Missouri, or elsewhere, then why are most of the laws affecting the employment rights of individuals usually made applicable to broad categories of employers that include persons, individuals, partnerships, associations, corporations, trustees, receivers, and so forth, e.g. workers' compensation, §287.030; unemployment benefits, §288.030 (14); limitations upon working hours, §290.020; payment due a discharged employee, §290.110, all in the Revised Statutes of Missouri (1978)? Nor in the case of injury to reputation, does the law appear to distinguish between corporations and other persons in imposing liability for such injuries, e.g. 53 C.J.S., Libel & Slander, §148. And, of course, as noted earlier, the state anti-blacklisting statute was repealed in 1977 by the legislature.

The question arises as to why out of such a background corporate entities are singled out for special treatment? We submit that there is no rule of law which holds that corporate employers are more or are less truthful in their dealing with their employees than other classes of employer.

Or is the reason for the survival of this discriminatory and arbitrary classification a more subtle one, namely a way to impose liability for an alleged wrongful discharge under the guise of an allegedly untruthful service letter, which poses the same essential problem faced by this court in *Vaca v. Sipes*, (1967) 386 U.S. 171, 193-195 (there the jury verdict was found to be based not upon the issue of good faith, or more particularly the lack thereof, of the union in handling the employee's grievance, but rather upon the merits of the grievance itself, and in effect a form of action for wrongful discharge).

The denial of equal protection is enhanced by such additional factors as the decisional law which allows un-

limited punitive damages based upon a nominal award of actual damages, without a showing of actual malice in these cases, *Heuer v. John R. Thompson Co.*, (Mo.App. 1952) 251 S.W.2d 980, 985; also Missouri Approved Instructions (M.A.I.) 23.08 and 16.01; the refusal of the Missouri courts to recognize good faith or negligence as a defense in these cases, e.g. *Potter v. Milbank Mfg. Co.*, (Mo. 1972) 489 S.W.2d 197, 206, also see M.A.I. 23.08, although the Service Letter Statute does not contain any language which excludes such defenses; and the vague and uncertain vice of the statute, which is urged here as a reason for review by petitioner under Point I of these reasons. Additionally, and of equal importance, is the question of First Amendment rights of free expression which petitioner corporation urges have been infringed upon by the application of the Service Letter Statute requiring the petitioner to speak without allowing petitioner and other corporate employers the same constitutional safeguards extended to others and by imposing absolute liability upon corporate employers only for the slightest infraction, no matter how innocently or unimportant the infraction may have been.

It is urged that the same rationale present in the arguments advanced under Points I and II here, as to the conflict between the decisions of this Court on Due Process and First Amendment grounds are equally applicable under this point. Furthermore, it is also strongly urged that since the decision of this Court in *Prudential Insurance Co. v. Cheek*, (1922) 259 U.S. 530, the law regarding the scope of economic regulation and its relationship to the rights of persons, including corporations, has undergone radical revision, e.g. witness *First National Bank of Boston v. Bellotti*, (1978) 435 U.S. 765, and to whatever extent the *Cheek* decision may still have application is deserving of reexamination.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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